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In The
Supreme Court of the United States
October Term, 1991

RODNEY D. BALL, SR.; HARLESS V. BELCHER;
JUNIOR F. BILLINGS; LYNN S. COMBS;
RONALD J. DAVIS; THEODORE H. HARRIS; JERRY
W. HOLMES; EDDIE D. KIRK; LARRY E. OLIVER;
GERALD H. PROFFIT; DONALD R. ROLEN; FRANK
E. ROOP, JR.; JESSIE F. STAMPER; ROGER L.
TAYLOR; HORACE G. WHITE, JR.; JOHNNIE
WILLIAMS; ROBERT E. THOMPSON; GENEVA A.
THOMPSON; WILLIAM R. LEVITT; SHIRLEY LEVITT,

Petitioners,

v.

JOY TECHNOLOGIES INC., formerly Joy
Manufacturing Company, a Pennsylvania Corporation,

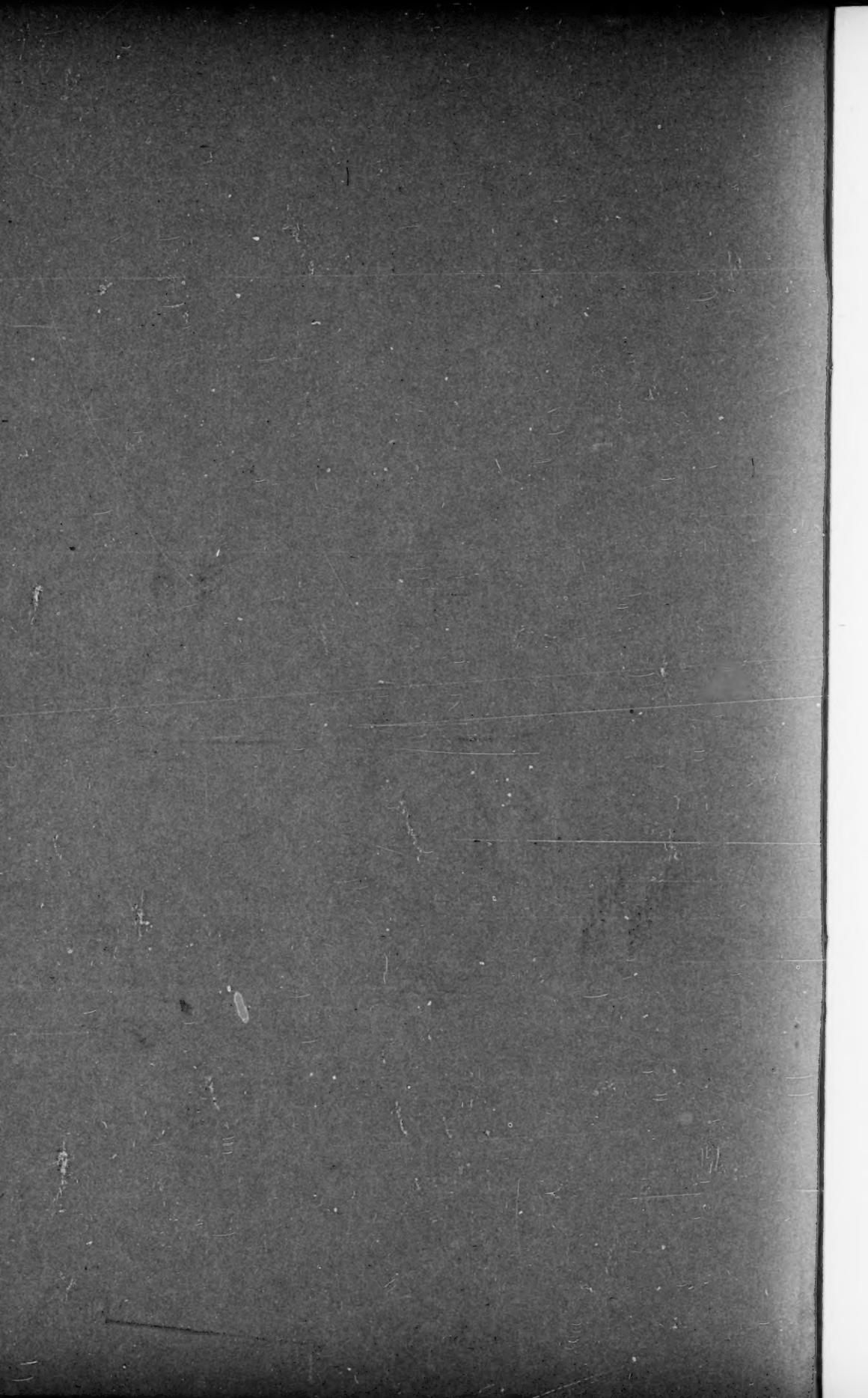
Respondent.

**Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Fourth Circuit**

BRIEF IN OPPOSITION

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I. QUESTION PRESENTED

1. Whether West Virginia and Virginia Law, Which Require Physical Injury to Support a Claim for Emotional Distress and Future Medical Expenses, Mandated Summary Judgment, Given the Plaintiffs' Lack of Physical Injury.

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IV. STATEMENT OF THE CASE

The plaintiffs have filed a petition for certiorari from a judgment of the United States Court of Appeals for the Fourth Circuit dated August 5, 1991, which affirmed a judgment of the United States District Court for the Southern District of West Virginia at Bluefield, West Virginia, in favor of the defendant Joy Technologies Inc.,¹ entered on September 18, 1990.

In their petition for certiorari, the plaintiffs describe only certain limited facts. The plaintiffs intimate that this case is of grand importance to plaintiffs who are disadvantaged by finding themselves trapped in federal court. If this is so, then these plaintiffs created their own disadvantage. These consolidated actions were originally filed by the plaintiffs in the United States District Court for the Southern District of West Virginia at Bluefield, West Virginia. Throughout the litigation, the plaintiffs clung to their chosen forum in federal district court and only sought to abandon it after the adverse summary judgment ruling. At oral argument on Joy's motion for summary judgment, the district court inquired as to whether either party favored certification. The court noted "It was obvious to the court at such time that neither of the parties favored this alternative. Rather, both parties felt confident of their respective positions and desired that

¹ On June 26, 1987, Joy Manufacturing Co. was merged into Joy Technologies Inc., with Joy Technologies Inc., being the surviving corporation. Joy Technologies Inc. owns fifty percent of the stock of Joy MK Projects Co. Joy Technologies Inc. has no other partially owned subsidiaries.

this court reach a determination on the motion for summary judgment based on its interpretation of the present state of the law."²

For purposes of appeal, the plaintiffs portray this action as involving claims for emotional distress and medical monitoring allegedly caused by their exposure to chemicals as a result of Joy's "wrongful misconduct."³ Plaintiffs fail to reveal that the eighteen employee or occupational plaintiffs⁴ based their claims upon West Virginia workers' compensation law, seeking damages for occupational exposure to chemicals under W. Va. Code § 23-4-2, the "deliberate intention" exception to the immunity afforded Joy under § 23-2-6 of the West Virginia Workers' Compensation Act. The only *negligence* claim pled for an occupational plaintiff was for "non-occupational exposure" because Joy "negligently and/or recklessly encouraged and allowed its employees to take PCB oil and PCB contaminated material home with them . . ." The only direct claim – as opposed to a derivative claim for loss of consortium – made by a non-employee was that of Geneva Thompson who alleged exposure to chemicals brought home on her husband's clothing, person, tools and lunchbox.

² 755 F. Supp. 1373.

³ *Petition for Certiorari* at p. 2.

⁴ Three civil actions, *Rodney D. Ball, et al. v. Joy Mfg. Co.*, *Geneva Thompson, et al. v. Joy Technologies Inc.*, and *Levitt v. Joy Technologies Inc.*, were consolidated by the District Court in an order dated August 10, 1989. Eighteen plaintiffs are present or former employees of Joy Technologies Inc., and two plaintiffs are spouses.

After three years of discovery, in response to Joy's summary judgment motion, the plaintiffs changed their legal theory, claiming that their "injury" was the mere exposure to chemicals and not any physical manifestation resulting from the exposure.⁵ From this "injury," the plaintiffs claimed damages for emotional distress (for which they had no medical testimony⁶) and the cost of future medical testing allegedly necessitated by the exposure. Until their response to Joy's motion for summary judgment, the plaintiffs never claimed that West Virginia workers' compensation law did not apply. They changed their theory only in response to Joy's position in its motion for summary judgment that plaintiffs could not satisfy the stringent requirements of the claims which they had pled under W. Va. Code § 23-4-2.

The plaintiffs' current portrayal of their damage claims is similarly misleading. Their complaints expressly sought damages for *present* physical injuries, alleging that they had "physical and mental injuries, past, present and future" as a result of exposure to chemicals. They abandoned these claims after Joy sought an order requiring physical and mental examinations pursuant to Fed. R. Civ. P. 35. Indeed, plaintiffs admitted at oral argument on the motion for summary judgment that they did not claim any manifestation, symptom, or injury caused by their exposure.⁷ In similar fashion, they abandoned their claims for increased risk of future disease by failing to contest Joy's motion for summary judgment.⁸

⁵ 755 F. Supp. at 1349.

⁶ 755 F. Supp. at 1370.

⁷ 755 F. Supp. at 1349.

⁸ 755 F. Supp. at 1348.

Thus, contrary to the current portrayal of their claims in this Court, the plaintiffs pled factual claims and legal theories in the district court which were strategically abandoned both to avoid discovery and summary judgment.

The district court verbally notified the parties on August 6, 1990, that it was granting Joy's motion for summary judgment; suddenly, the plaintiffs, who had never sought, and had even refused, certification, filed a motion making such a request. The district court denied the motion as "*untimely*."⁹

The district court granted summary judgment for the defendant because the plaintiffs lacked physical injury which is required under West Virginia and Virginia law to support their claims.¹⁰ The United States Court of Appeals for the Fourth Circuit affirmed the grant of summary judgment in an unpublished opinion.

V. SUMMARY OF ARGUMENT

Established West Virginia and Virginia precedent requires physical injury to support claims of negligent infliction of emotional distress and future medical

⁹ The United States Court of Appeals for the Fourth Circuit also denied a motion for certification made by the plaintiffs.

¹⁰ Prior to 1978, the occupational plaintiffs were employed at the defendant's Bluefield, West Virginia, facility. In 1978, the defendant's operation was moved to Bluefield, Virginia.

expenses. The plaintiffs admitted that they had no physical injury and claimed that the mere exposure to chemicals was their only injury. The district court properly applied West Virginia and Virginia law in granting defendant's motion for summary judgment, and the fourth circuit correctly affirmed that judgment.

Both the district court and the circuit court properly refused to reject established and controlling state court precedent. Contrary to plaintiffs' assertion, this case does not present a novel issue of state law.

The plaintiffs' implication that they were somehow disadvantaged by being in a federal forum in this action is misleading. The plaintiffs chose to file this action in federal court. Moreover, prior to the district court's ruling on summary judgment, the plaintiffs resisted certification of questions to the Supreme Court of Appeals of West Virginia. Having actively sought a federal court determination of their claim, the plaintiffs should not now be heard to say that the standard for determining state law applied in the federal court creates an unfair opportunity for defendants to "forum shop" in removing cases to federal court.

Finally, the asserted issue regarding the standard for determining state law questions was not raised by the plaintiffs below and is not properly presented for review by this Court.

VI. ARGUMENT

A. The Plaintiffs' Lack of Physical Injury Mandated Summary Judgment for the Defendant Under West Virginia and Virginia Law Which Require Physical Injury to Support Claims for Emotional Distress and Future Medical Expenses.

The plaintiffs attempt to characterize this case as presenting a novel question of state law. The plaintiffs ignore, however, well established Virginia and West Virginia precedent which require physical injury to support the plaintiffs' claims.

With the exception of intentional infliction of emotional distress, damages for emotional distress may not be recovered under West Virginia or Virginia law absent a finding of physical injury. *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340, 36 S.E.2d 475, 478 (1945); *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214, 219 (1973). The plaintiffs' mere exposure to chemicals does not provide the requisite physical injury to entitle the plaintiffs to recover for alleged emotional distress. See, e.g., *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981); *Pauley v. Combustion Engineering, Inc.*, 528 F. Supp. 759 (S.D.W. Va. 1981) (applying West Virginia law). The district court and the fourth circuit both therefore properly concluded that the plaintiffs could not recover for alleged emotional distress absent physical injury.

The Supreme Court of Appeals of West Virginia's recent decision in *Johnson v. West Virginia University Hospitals, Inc.*, 1991 WL 245575 (W. Va., Nov. 21, 1991), demonstrates that mere exposure to chemicals cannot support a claim for emotional distress without physical injury. In

Johnson, the plaintiff, a hospital security guard, was bitten by a patient suffering from Acquired Immune Deficiency Syndrome (AIDS). *Johnson*, an employee of West Virginia Security Police, sought damages for emotional distress from the defendant West Virginia University Hospitals, Inc., alleging that it negligently failed to warn him of the patient's infection. In affirming a jury award for the plaintiff, the West Virginia court reiterated the requirement of physical injury. The court stated:

As a general rule, absent physical injury, there is no allowable recovery for negligent infliction of emotional distress. [cite omitted]. The Court has recognized this traditional principle: "There can be no recovery in tort for an emotional and mental trouble alone without ascertainable physical injuries arising [from] . . . the simple negligence of the defendant." Syl., in part, *Monteleone v. Co-Operative Transit Co.*, 128 W. Va., 340, 36 S.E.2d 475 (1945).

Johnson at 5.

The court thus held that:

. . . damages for emotional distress may be recovered by a plaintiff against a hospital based upon the plaintiff's fear of contracting Acquired Immune Deficiency Syndrome (AIDS) if: the plaintiff is not an employee of the hospital¹¹ but

¹¹ If *Johnson* had been an employee of the defendant his claim would have been barred by workers' compensation immunity under W. Va. Code § 23-2-6. See *Johnson* at fn. 8. Likewise, in the present action, if the occupational plaintiffs were found to have actually incurred an injury, which they did not, their only remedy against Joy, their employer, would be through workers' compensation, and their action would be barred under workers' compensation immunity.

has a duty to assist hospital personnel in dealing with a patient infected with AIDS; the plaintiff's fear is reasonable; *the AIDS infected patient physically injures the plaintiff and such physical injury causes the plaintiff to be exposed to AIDS*; and the hospital has failed to follow a regulation which requires it to warn the plaintiff of the fact that the patient has AIDS despite the elapse of sufficient time to warn.

Johnson at 10 (emphasis added). The court concluded that Johnson fulfilled the physical injury requirement because the bite was a physical injury and the bite lead directly to his exposure.

The court in *Johnson* emphasized the limited nature of its holding:

We emphasize that our decision herein is not to permit recovery of emotional distress damages to anyone who comes into contact with a person who is infected with AIDS or merely believes that a person is infected with AIDS. Rather, as stated above, recovery of such damages is limited to the situation where the plaintiff is actually exposed to the AIDS virus *as a result of a physical injury*, and emotional distress, along with physical manifestations of such distress, result therefrom.

Johnson at 10 (emphasis added).

Just as mere exposure to the AIDS virus without physical injury is insufficient under *Johnson* to support a cause of action for emotional distress, mere exposure to chemicals is insufficient to support the plaintiffs' claims in this action. See *Rittenhouse v. St. Regis Hotel Joint Venture*, 149 Misc. 2d 452, 565 N.Y.S.2d 365 (1990) (fear of

cancer from exposure to asbestos *without any physical indication of disease* does not lead to recovery for emotional distress damages) (cited in *Johnson*).

Numerous other jurisdictions have also concluded that mere exposure to chemicals without physical injury cannot support a claim for emotional distress. See, e.g., *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986) (rejecting plaintiff's claims for mental distress damages under Louisiana law because he failed to establish that he sustained an injury from his exposure to asbestos products); *Plummer v. Abbott Laboratories*, 568 F. Supp. 920 (D.R.I. 1983) (plaintiff's ingestion of diethylstilbestrol did not *per se* constitute a physical injury under Rhode Island law); *Syvert v. United States*, 559 F. Supp. 546 (D.D.C. 1983) (plaintiff suffered no physical injury from exposure to tubercle bacilli, and could not recover mental distress damages under Virginia law); *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985) (Florida law does not recognize inhalation of asbestos as physical injury); *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (Mass. 1982) (plaintiff's in utero exposure to diethylstilbestrol was not a physical injury or harm under Massachusetts law).

The plaintiffs assert that because the Supreme Court of Appeals of West Virginia has a reputation as a liberal progressive court, it might reverse the *Monteleone* requirement of physical injury. This speculation is completely foreclosed by the court's reaffirmation of *Monteleone* and the physical injury requirement in *Johnson, supra*.

The district court and the fourth circuit also correctly rejected plaintiffs' claims for medical surveillance costs.

Under both West Virginia and Virginia law, such a claim for future medical expenses is only available where a plaintiff has sustained a physical injury proximately caused by the defendant. *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618, 637 (1974); *Hailes v. Gonzales*, 207 Va. 612, 151 S.E.2d 388, 390 (1966). Plaintiffs' lack of present physical injury therefore required summary judgment on the medical surveillance claim under established West Virginia and Virginia law.

B. The Fourth Circuit Properly Applied Established State Law in Affirming the District Court's Order Granting Summary Judgment.

The plaintiffs now attempt to assert that there is conflict among the federal circuits regarding the proper resolution of novel issues of state law, and that this court should therefore review the fourth circuit's holding in this action. Plaintiffs' argument fails in numerous respects. Most importantly, this is not a case which turns on a novel issue of state law. As demonstrated above, both the district court's and the fourth circuit's opinions are well-founded in established West Virginia and Virginia precedent. Both the district court and the fourth circuit applied presently existing state law and refused to surmise that the West Virginia Supreme Court of Appeals would overrule established precedent. See 755 F. Supp. at 1372. This case therefore does not raise any question regarding novel issues of state law, particularly in light of the *Johnson* decision, *supra*.

Additionally, contrary to plaintiffs' assertion, there is no conflict between the ninth circuit's decision in *Paul v.*

Watchtower Bible and Tract Soc. of New York, Inc., 819 F.2d 875, 879 (9th Cir.), cert. denied, 484 U.S. 926 (1987), and the fourth circuit's decision below. The fourth circuit stated that "the Erie doctrine permits federal courts 'to rule upon state law as it presently exists and not to surmise or suggest its expansion.' *Washington v. Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir. 1989)." App. at 6-7. Because the law of West Virginia and Virginia requires physical injury before a plaintiff may recover damages for emotional distress, the district court and the fourth circuit correctly concluded that the plaintiffs' exposure to chemicals did not constitute an injury that would entitle them to recover damages for emotional distress. *Id.* The fourth circuit simply refused to create out of the whole cloth a new cause of action which did not require physical injury, in light of the established West Virginia and Virginia case law requiring physical injury.

The fourth circuit's refusal to reject established state law precedent is not inconsistent with the ninth circuit's holding in *Paul*. *Paul* indicates that in an appropriate circumstance a federal court may afford relief even though the state court has not yet clearly enunciated a rule providing for such relief. *Paul* does not stand for the proposition that a federal court may substitute its own judgment for state law and reject established state court precedent.

It is significant to note that neither the fourth circuit nor the district court found a reasonable basis to suggest that the state courts of West Virginia or Virginia would allow recovery in this action. As stated by the district court:

. . . this Court must apply the presently existing law of these states and not suggest or surmise its expansion. Where such law is unclear or unsettled, this Court must faithfully make an informed prediction as to how those States' highest courts would rule if the case were before them and may not do so according to its own sense of what the law should be. See *Kline v. Wheels By Kinney, Inc.*, 464 F.2d 184, 187 (4th Cir. 1972).

In light of the presently existing law of these States, this court cannot reasonably and faithfully predict that their highest courts would recognize the Plaintiffs' claims to recover the costs of future medical monitoring where these plaintiffs have not suffered an actionable injury under such law.

755 F. Supp. at 1372.

Thus, even following *Paul's* suggestion that a federal court may provide relief without clearly established state precedent, there is absolutely no basis to conclude West Virginia or Virginia would allow the plaintiffs to recover without physical injury. This conclusion is especially true in light of the recent *Johnson* decision.

The problem suggested by the ninth circuit in *Paul* regarding the removal of claims involving novel issues is not raised by the fourth circuit's decision in *Ball v. Joy Manufacturing*. The ninth circuit stated in *Paul* that:

a policy by the federal court never to advance beyond existing state court precedent would vest in defendants the power to bar the successful adjudication of plaintiffs' claims in cases with novel issues; defendants could ensure a

decision in their favor simply by removing the case to federal court.

819 F.2d at 879. The fourth circuit's decision in *Ball v. Joy Manufacturing* creates no such policy. The fourth circuit simply held that the Erie Doctrine permits federal courts to rule upon state law as it presently exists, and that the state law of West Virginia and Virginia required the rejection of the plaintiffs' claims.

It is significant to note that the plaintiffs in their attempt to concoct a conflict between the circuits in their petition do not quote from the fourth circuit's opinion in *Ball v. Joy Manufacturing*. Rather, the plaintiffs quote from the fourth circuit's *per curiam* opinion in *Tritle v. Crown Airways, Inc.*, 928 F.2d 81 (4th Cir. 1990). The fourth circuit, in its opinion in *Ball*, does not even refer to the *Tritle* opinion. Any alleged conflict between the fourth circuit's position in *Tritle*, and the ninth circuit's position in *Paul* obviously does not justify the review of the fourth circuit's decision in this action which does not even rely upon *Tritle*. Moreover, *Tritle* does not create a policy to never advance beyond existing state court precedent and is therefore reconcilable with *Paul*.

Plaintiffs' contention that the fourth circuit's holdings in *Washington* and *Tritle* provide defendants with an unfair weapon in removing claims involving novel issues to federal court is misleading. This action was not removed to federal court; the plaintiffs chose to file this action originally in federal court. Moreover, the plaintiffs rejected the suggestion made by the district court prior to ruling on the motion for summary judgment that the question could be certified to the West Virginia Supreme

Court of Appeals, and only sought to certify questions to the West Virginia Supreme Court of Appeals after the district court resolved the motion for summary judgment against the plaintiffs. The plaintiffs having sought a federal determination of their claim cannot now complain of the federal court's refusal to reject established state law. Certainly, given the fact that this case was never removed, it is not the appropriate case to resolve any issue regarding the determination of state law in removed actions.

C. Plaintiffs Failed to Raise Below the Issue Upon Which They Now Seek Review.

The plaintiffs made no issue in the court below regarding the standard stated by the fourth circuit in *Washington* and *Tittle*, *supra*.¹² In fact, the plaintiffs did not refer to *Washington* or *Tittle* in their brief to the fourth circuit. Nor did the plaintiffs rely upon or refer to *Paul*, *supra*, in their brief to the fourth circuit. Moreover, the plaintiffs made no request for an *en banc* hearing before the fourth circuit to seek review of the issue they now attempt to raise. Any issue regarding the correctness of *Washington* or *Tittle* simply was not raised below, and should not be reviewed by this Court:

¹² The plaintiffs did raise an issue in the fourth circuit regarding whether the circuit court should give substantial deference to the district court's determination of state law. This issue was resolved by this Court's decision in *Salve Regina College v. Russel*, 111 S. Ct. 1217 (1991), prior to the fourth circuit's decision in this action.

Ordinarily, this Court does not decide questions not raised or resolved in the lower court. . . . It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.

Youakim v. Miller, 425 U.S. 231, 234 (1976) (internal quotations and citations omitted). There is nothing exceptional about this case which requires review by this Court.

VII. CONCLUSION

Plaintiffs admitted they had no physical injury. West Virginia and Virginia law require physical injury to support the plaintiffs' claims. Given the absence of the required physical injury, the district court properly granted summary judgment and the fourth circuit properly affirmed that judgment. There simply is no significant issue presented in this action which requires review by this Court. Plaintiffs' petition for a writ of certiorari should therefore be denied.

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